No. 98-678

IN THE

Supreme Court of the United States

October Term 1998

LOS ANGELES POLICE DEPARTMENT,

Petitioner,

-v.-

UNITED REPORTING PUBLISHING CORP.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATES OF NEW YORK *et al.* AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the government violates the First Amendment when it refuses to release records for commercial use.

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BRIEF OF THE STATES OF NEW YORK *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Sup. Ct. R. 37, the signatory States respectfully submit this brief as *amici curiae* in support of petitioner.

INTEREST OF *AMICI CURIAE*

The States have a significant interest in the question this case presents. At issue is the validity, under the First Amendment, of a California statute prohibiting access to and use of personal address information contained in police reports when the information is sought "to sell a product or service." Each of the many States that limit access to or use of government information by commercial concerns has an interest in the determination whether such a limitation comports with the First Amendment when the records at issue are otherwise available for public inspection.

As catalogued in the appendix to the petition for certiorari, many States have such statutes. Some States, in their general freedom of information or open records statutes, restrict access to or use of personal information contained in public records by commercial interests. New York, for example, includes as "[a]n unwarranted invasion of personal privacy" not subject to disclosure any "lists of names and addresses if such lists would be used for commercial or fund-raising purposes." N.Y. Pub. Off. Law § 89 (McKinney 1998). At least six other States have similar provisions. *See, e.g.*, Md. Code Ann., State Gov't § 9-1015 (1997) ("[a]n individual may not request" records "for the purpose of commercial solicitation"); R.I. Gen. Laws § 38-2-6 (1997) (no "use" of "information obtained from public records ... to solicit for commercial purposes").

Other States place restrictions on access to or use of particular types of records. Most clearly concerned with the present case are the seven States with statutes that either deny would-be commercial users access to police reports, *see, e.g.*, Colo. Rev. Stat. § 24-72-305.5 (1997) (denying "access" to those who would use information in police reports "for the direct solicitation of business"), or prohibit use of the information in these reports for "commercial solicitation," *see, e.g.*, Fla. Stat. ch.

119.105 (1998). Closely related to such statutes are the eight State laws placing similar restrictions on access to or use of accident reports. *See, e.g.*, S.C. Code Ann. § 56-5-1275 (Law. Co-op. 1997) (those whose "intended use" is "for commercial solicitation purposes" may not "examine" reports); Haw. Rev. Stat. § 286-172 (Michie 1997) (information in reports may not be "used ... for the purposes of any commercial solicitation"). In addition, six States restrict disclosure of motor vehicle records for commercial purposes, *see, e.g.*, Ark. Code Ann. § 27-14-412 (Michie 1997) ("[m]otor vehicle registration information shall not be sold, furnished, or used for commercial solicitation purposes"); eleven States prohibit use of public assistance records for such purposes, *see, e.g.*, Mich. Stat. Ann. § 16.464 (Law. Co-op. 1997) (prohibiting use of information regarding applicants for or recipients of public assistance "for political or commercial purposes"); and nineteen States extend the same prohibition to election records, *see, e.g.*, Minn. Stat. § 10A.02 (Supp. 1997) (reports may not be "utilized ... for any commercial purpose").

In all, thirty-eight States have statutes that restrict either access to or use of otherwise-available public records by those who seek such records with a commercial purpose. The decision of the court below squarely holds that a statute that permits publication in the media of information contained in government records, but denies commercial interests access to such records, violates the First Amendment. This Court's decision will potentially affect all such statutes, and the *amici* States thus have a strong interest in the outcome of the case.

SUMMARY OF ARGUMENT

As a limitation on access to government records rather than a prohibition on speech concerning matters contained in government records, the provision of the California Public Records Act at issue in this case does not implicate the First Amendment at

all. This Court has made clear that there is no First Amendment guarantee of a right of access to information in the government's control and that restricting access to sensitive information as a means of safeguarding privacy is preferable to limiting or punishing speech involving such information. The Court's decisions involving the federal Freedom of Information Act, on which the California Public Records Act is modeled, establish the validity of a statute which categorically provides that the individual privacy interest in avoiding commercial intrusions in the home outweighs any entitlement to access to information for commercial purposes.

Even if § 6254(f)(3) is viewed as having First Amendment implications, it survives constitutional scrutiny. Under the *Central Hudson* test for commercial speech, a government regulation of speech that concerns lawful activity is valid if it directly advances a substantial government interest and is no more extensive than necessary to serve that interest. Even assuming that the speech proposed by respondent concerns lawful activity, the California statute satisfies the remaining three prongs of *Central Hudson*.

The State's interest in protecting the privacy of arrestees is substantial. The statute directly advances that interest. The court below erred in concluding that, because the statute permits publication of arrestees' names and addresses in the media, it cannot advance their interest in privacy. The privacy interests in avoiding public exposure and in avoiding commercial intrusion in the home are distinct. The fact that the statute authorizes media access to and publication of arrestees' names and addresses does not vitiate the separate right of arrestees to be free of unwanted commercial intrusions. The statute advances this separate interest. Moreover, this Court's cases make clear that some disclosure of personal information does not destroy a privacy right in avoiding further disclosure of such information. The California statute, by limiting but not foreclosing all access

to arrestee address information, validly protects this information from further disclosure. The California statute is closely tailored to the interest it serves, targeting and restricting only commercial speech because that speech is the source of the distinct invasion of privacy against which the State is trying to protect.

ARGUMENT

POINT I

THE CALIFORNIA STATUTE IS A VALID LIMITATION ON ACCESS TO PUBLIC RECORDS WITH NO FIRST AMENDMENT IMPLICATIONS.

The provision of the California Public Records Act at issue in this case restricts would-be commercial users' access to the addresses of crime victims and arrestees. As a limitation on access to government records, it does not implicate the First Amendment at all. Rather, the California statute represents a permissible legislative policy choice that balances a public right of access to government information and the right of privacy that is infringed by disclosure of such information. In accomplishing this balance, the California statute resembles the federal Freedom of Information Act (FOIA), on which the California Public Records Act is modeled. This Court's FOIA cases make clear that a statute limiting disclosure for the sake of privacy neither violates nor implicates the First Amendment.

This case does not involve regulation of constitutionally-protected commercial "speech." The Court's "test for identifying commercial speech" is whether the speech in question "'propose[s] a commercial transaction.'" *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 473-74 (1989) (*cit. om.*). The typical commercial speech case involves either a governmental prohibition on some type of commercial solicitation, *see, e.g., Florida Bar v. Went For It, Inc.*, 515 U.S. 618

(1995) (prohibition on targeted direct-mail solicitation); *Edenfield v. Fane*, 507 U.S. 761 (prohibition on uninvited in-person solicitation), or a limitation on the content of otherwise-permissible commercial speech, *see, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (prohibition on price information in retail liquor advertisements); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (prohibition on display of alcohol content on beer labels).

This case involves neither such restriction. The California Public Records Act generally authorizes "inspection" of all public records, Cal. Gov't Code § 6253 (Deering 1997), but exempts certain records from "disclosure," *id.* § 6254, and in turn excludes from this exemption the addresses of crime victims and arrestees, as long as these are disclosed only to persons with a scholarly, journalistic, political, governmental or investigative purpose, *id.* § 6254(f)(3). The California statute does not address, let alone limit, the right of United Reporting Publishing Corp. ("United Reporting") to advertise or disclose information in any fashion or any medium. Nor does the statute restrict the information United Reporting may use in its advertisements or disclosures. The California statute thus functions as a restriction on access to rather than as a prohibition of speech concerning address information.

The distinction between limiting access to records and restricting speech about information contained in records is critical to a proper perspective on this case. *See Walker v. South Carolina Dept. of Highways & Public Tranportation*, 466 S.E. 2d 346, 348 (S.C. 1995) (state statute denying access to accident reports "for commercial solicitation purposes" "regulates only access to information" and "in no way inhibits" exercise of First Amendment rights). In the view of the court below, it is United Reporting's use in commercial speech of address information that triggers the protection of the First Amendment. A restriction on access to government information, however--with certain

exceptions involving criminal proceedings indisputably irrelevant to this case[1] -- has no First Amendment implications. This Court "has never intimated a First Amendment guarantee of a right of access to all sources of information within government control." *Houchins v. KQED, Inc.*, 438 U.S. 1, 9 (1978) (plurality opinion). There is not "a special privilege of *access* to information as distinguished from a right to publish information which has been obtained." *Id.* at 10; *see also Zemel v. Rusk*, 381 U.S. 1, 17 (1965) ("The right to speak and publish does not carry with it the unrestrained right to gather information").

The questions of access to government information and of speech incorporating such information simply do not occupy the same constitutional space. The federal government, all fifty States, and the District of Columbia have statutes permitting access to government records. *See generally* Bruce D. Goldstein, Comment, *Confidentiality and Dissemination of Personal Information: An Examination of State Laws Governing Data Protection*, 41 Emory L. J. 1185 (1992). But these statutes are made necessary by the absence of a First Amendment right of access to government information. If such a right existed, the freedom of information laws would be superfluous. Only because "citizens have no First Amendment right of access to traditionally nonpublic government information" must a party seeking release of government information "rel[y] upon a statutory entitlement -- as narrowed by statutory exceptions --

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[1]The Court has recognized a qualified First Amendment right of access to criminal proceedings based on the crucial role traditionally played by public access in the functioning of the criminal justice system. *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (access to preliminary hearing in criminal proceeding); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (access to jury selection); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (access to criminal trial during testimony of minor victim); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (plurality opinion) (access to criminal trial). This right has never been held to extend to the contents of a police blotter.

and not upon his constitutional right to free expression." *McGehee v. Casey*, 718 F.2d 1137, 1147 (D.C. Cir. 1983).

Just as there is no constitutional right of access to public records, nothing in the Constitution prohibits a government from allowing access to information only to those with a particular purpose in inspecting it. Access to information is a matter of "legislative grace," *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984). It is true that both the FOIA and the California Public Records Act do not generally distinguish between requests for information on the basis of the requester's identity. *See United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 771 (1989) ("Congress 'clearly intended' the FOIA 'to give any member of the public as much right to disclosure as one with a special interest'") (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975)); *American Civil Liberties Union Foundation of Northern California, Inc. v. Deukmejian*, 651 P.2d 822, 826 (Cal. 1982) (Public Records Act "imposes no limits on who may seek information"). But this is a question of legislative choice rather than constitutional mandate, and a legislature can readily choose otherwise.[2]

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[2]When the government is not constitutionally obliged to provide resources, it may place conditions on the use of the resources it does make available. These conditions may facilitate one sort of speech rather than another in the service of the legislature's policy choices. Thus, for example, in *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court upheld a government prohibition on recipients of federal funds for "family planning services" from engaging in abortion conselling and referral. This prohibition, the Court said, did not implicate the First Amendment, for "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program." *Id.* at 193; *see also Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983) (denial of tax exemption for lobbying organization does not violate First Amendment). In the same way, the California legislature, which need not release address information all, may make it available to those with a

Thus, for example, the predecessor to FOIA, section 3 of the Administrative Procedure Act, 60 Stat. 237 (1946), limited disclosure to "persons properly and directly concerned" with the information. While Congress eventually recognized section 3 "as falling far short of its disclosure goals" and enacted the FOIA, *see Environmental Protection Agency v. Mink*, 410 U.S. 73, 79 (1973) (reviewing legislative history of FOIA), it did so as a matter of policy rather than constitutional requirement. Similarly, § 6254(f)(3), in its categorical judgment that access to address information should be denied to commercial interests and curiosity-seekers but granted to others, is no more than a permissible policy decision. It differs from the general Public Records Act policy of granting access to all when it is granted to anyone, but the difference has no First Amendment meaning.

Indeed, the Court has made clear that limiting access to information in the government's possession is preferable to restricting the speech use that may be made of the information once it is disclosed. In *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), a newspaper published the name of a rape victim obtained from a publicly-released police report. The Court invalidated on First Amendment grounds the newspaper's liability under a Florida statute that made it unlawful to "print, publish or broadcast" the name of a victim of a sexual offense. *Id.* at 526. In the Court's view, the government, without prohibiting or penalizing speech,

> retains ample means of safeguarding significant interests upon which publication may impinge.... To the extent sensitive information is in the government's custody, it has even greater power to forestall or mitigate the injury caused by its release. The govern-

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scholarly or governmental interest but not to those with a commercial purpose without implicating the First Amendment.

> ment may classify certain information [or] establish and enforce procedures ensuring its redacted release.... Where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts.

Id. at 534. In other words, restricting access is "less drastic" than restricting speech: A government's refusal to provide sensitive information to the public is a "far more limited means of guarding against dissemination than the extreme step of punishing truthful speech." *Id.* at 538.

It is therefore from the perspective not of First Amendment law, but of freedom of information law, that the provision of the California Public Records Act at issue in this case can best be understood. The California Public Records Act is modeled on the federal FOIA, 5 USC § 552 (1996), and judicial construction "of the federal act serve[s] to illuminate the interpretation of its California counterpart." *American Civil Liberties Union*, 651 P.2d at 828. The federal FOIA exempts from disclosure personnel files "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 USC § 552(b)(6) (1996). This Court's decisions on and discussions of the federal FOIA leave no doubt that the restrictions on access to address information embodied in § 6254(f)(3) are a valid exercise of government authority that does not implicate First Amendment concerns.

The principal purpose of § 6254(f)(3), as recognized by the court below, is protection of the privacy of victims and arrestees by confining disclosure of their addresses to persons with certain noncommercial interests. *United Reporting Publishing Corp. v. California Highway Patrol*, 146 F.3d 1133, 1138 (9th Cir. 1998). This Court has recognized the significant privacy interest of an individual in his or her home address. In *United States*

Department of Defense v. Federal Labor Relations Board, 510 U.S. 487 (1994), the collective-bargaining representatives of certain federal agency employees made FOIA requests for the employees' names and home addresses. The agencies provided the names but refused to release the home addresses, contending that their disclosure would constitute a clearly unwarranted invasion of personal privacy. The Court, in upholding the agencies' refusal, noted that "the employees' interest in nondisclosure [of their addresses] is not insubstantial." *Id.* at 500. This was so, moreover, even though home addresses are often publicly available through other sources. *Id.* As the Court observed, "[t]he privacy interest protected by [§ 552(b)(6)] 'encompass[es] the individual's control of information concerning his or her person,'" and this interest "does not dissolve simply because that information may be available to the public in some form." *Id.* (quoting *Reporters Committee*, 489 U.S. at 763).

It was precisely the employees' right to be free from unwelcome mail solicitation that provided the basis for the refusal of the FOIA request. "Even if the direct union/employee communication facilitated by the disclosure of home addresses were limited to mailings, this does not lessen the interest that individuals have in preventing at least some unsolicited, unwanted mail from reaching them at their homes." *Department of Defense*, 510 U.S. at 501; *see also Hopkins v. United States Department of Housing & Urban Development*, 929 F.2d 81, 88 (2d Cir. 1991) (likelihood that requesting union will use address information "to contact employees at their homes dramatically increases the already significant threat to the employees' privacy interests" from disclosure of payroll records). The Court professed itself "reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions." *Department of Defense*, 510 U.S. at 501.

Moreover, the Court added, "when we consider that other parties, such as commercial advertisers and solicitors," would

"have the same access under FOIA as the union" to the address lists, it was "clear that the individual privacy interest that would be protected by nondisclosure is far from insignificant." *Id.* at 501. Other federal courts, including the Ninth Circuit, likewise have found the solicitation that would result from disclosure of address lists to commercial interests to be an unwarranted invasion of privacy under FOIA and have also deemed no First Amendment concerns to be implicated. *See Lepelletier v. Federal Deposit Insurance Corp.*, 164 F.3d 37 (D.C. Cir. 1999) (list of depositors of unclaimed funds requested by "money finder" redacted in light of "the barrage of solicitations" that would follow disclosure); *Professional Programs Group v. Department of Commerce*, 29 F.3d 1349 (9th Cir. 1994) (requester's "purely commercial" interest in "obtain[ing] a list of potential customers" is "easily outweighed by the degree of the invasion into personal privacy"); *Minnis v. United States Department of Agriculture*, 737 F.2d 784, 786 (9th Cir. 1984) ("purely commercial" use of list of names and addresses outweighed by interest in personal privacy), *cert. denied*, 471 U.S. 1053 (1985); *Wine Hobby USA, Inc., v. Internal Revenue Service*, 502 F.2d 133, 137 (3d Cir. 1974) (list of names and addresses denied to commercial concern when a consequence of disclosure would be "unsolicited and possibly unwanted mail from [requester] and perhaps offensive mail from others").

The legislative balance struck by § 6254(f)(3) simply reflects the balance struck *ad hoc* and upheld in the foregoing decisions under the FOIA exemption in § 552(b)(6). The California legislature has determined that, in any given case, the right to disclosure of a list of victims' or arrestees' addresses to those interested in using them for commercial purposes is outweighed by the victims' and arrestees' privacy interest. *Department of Defense* indicates that there is nothing inherently impermissible in such a determination. Nor is the categorical, as opposed to *ad hoc*, nature of the California provision problematic. In *Reporters Committee*, 489 U.S. 749 (1989), the Court considered whether

the contents of an individual's FBI "rap sheet" were protected by FOIA exemption 7(c), which excludes from disclosure information compiled for law enforcement purposes if disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 USC § 552(b)(7)(c) (1996). The Court undertook to "balance the public interest in disclosure against the interest Congress intended the Exemption to protect," 489 U.S. at 776. It concluded not only that the interest in individual privacy outweighed the public interest in disclosure of the rap sheet in the particular case, but also that such a determination could be made categorically. In other words, in the entire "class of cases without regard to individual circumstances" in which "the subject of ... a rap sheet is a private citizen and ... the information is in the Government's control as a compilation," "as a categorical matter" a third party's request for information will invariably constitute an unwarranted invasion of privacy. *Id.* at 780.

What the Court accomplished in holding that, under a particular FOIA provision, "categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance [between disclosure and privacy] characteristically tips in one direction," *id.* at 776, a legislature may also accomplish in the first instance, by expressly providing in a statute that certain information is categorically exempt from disclosure under certain circumstances. And that is what the California legislature has done in § 6254(f)(3). As petitioner notes, the media do not routinely disclose the home addresses of most victims and arrestees. The legislature concluded that the occasional, unsystematic disclosure of victims' and arrestees' addresses that occurs in the press is acceptable, but that the massive disclosure and exploitation of the same addresses by commercial interests is not. Having balanced the public interest in disclosure of victims' and arrestees' addresses against the invasion of privacy that follows such disclosure, the legislature concluded that the invasion by

commercial interests was always unwarranted. It is a permissible conclusion, and one that -- like any other government decision not to disclose information -- does not implicate the First Amendment.

Thus, the California statute at issue in this case simply denies access to victims' and arrestees' address information to those with a commercial interest in the information. Such a restriction has no First Amendment implications, and the court below was mistaken in treating it as an infringement of United Reporting's commercial speech. The statute is no more than a permissible legislative balancing of the entitlement of commercial concerns to access to the information and the privacy right of arrestees to be free of unwelcome commercial solicitation.

POINT II

THE CALIFORNIA STATUTE IS A VALID RESTRICTION ON COMMERCIAL SPEECH.

Even if § 6254(f)(3) is viewed as having First Amendment implications, it survives constitutional scrutiny. Insofar as the statute restricts commercial speech, it does so no more extensively than necessary in direct advancement of California's substantial interest in preserving the privacy of arrestees, and therefore satisfies the First Amendment.

The test formulated by the Court for cases involving government restrictions on commercial speech requires that the commercial speech in question "concern lawful activity and not be misleading"; that the government interest supporting the restriction be "substantial"; that the regulation at issue "directly advanc[e] the governmental interest asserted"; and that the regulation be no "more extensive than is necessary to serve that interest." *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980).

The Court has recently reconceived *Central Hudson* as entailing a threshold inquiry into whether commercial speech "concerns lawful activity or is misleading," in which case the activity may be "freely regulate[d]," *Florida Bar*, 515 U.S. at 624, followed by a "three-part" test, *id.* at 635; *see also id.* at 636 (Kennedy, J., dissenting) (approving of Court's "three-part inquiry"). Even if any "speech" by United Reporting making use of address information in police reports is deemed to concern lawful activity, the company cannot prevail under the remaining three prongs of *Central Hudson*.

There can be no serious question that, as the court below recognized, the government interest in protecting the privacy of arrestees is substantial. This Court has observed, in its commercial speech jurisprudence as in its FOIA cases, that "'the protection of potential clients' privacy [from commercial solicitation] is a substantial state interest.'" *Florida Bar*, 515 U.S. at 625 (quoting *Edenfield*, 507 U.S. at 769).

The Ninth Circuit erred, however, in concluding that § 6254(f)(3) fails to advance the Government's interest in a direct and material way. That court believed that restricting use of personal address information for commercial purposes in order to vindicate victims' and arrestees' right of privacy while "allow[ing] the names and addresses of the same to be published in any newspaper, article or magazine in the country" was "not rational," for the exceptions to the restrictions in the statute "'undermine and counteract' the asserted government interest in preserving privacy" 146 F.3d at 1140. This view overlooks the fact that a privacy interest in avoiding commercial intrusions remains substantial and worthy of governmental protection even when some infringement of a different sort of privacy interest is permitted.

The court below, like other courts to have considered similar statutes, invoked *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466,

476 (1988), in which this Court, invalidating a State ban on attorney targeted-mail solicitation, rejected the contention that such solicitation "invade[s] the recipient's privacy any more than does a substantively identical letter mailed at large. The invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery." *See Amelkin v. McClure*, No. 94-00360, 1999 WL 73993 (6th Cir. Feb. 17, 1999) (invalidating Kentucky limitation on access to accident reports); *Speer v. Miller*, 864 F. Supp. 1294 (N.D. Ga. 1994) (invalidating Georgia limitation on access to crime and accident reports).

More recent cases of this Court, however, reject *Shapero's* all-or-nothing view of privacy. They recognize instead that there are different types of privacy, that permitting an invasion of one type of privacy leaves unimpaired the interest in avoiding infringements of other types, and that an initial invasion of privacy does not render subsequent invasions harmless. The basic insight of these cases, whether decided under the First Amendment or FOIA, is that some loss of privacy in personal information does not amount to or require a complete loss of privacy. It is this insight that animates § 6254(f)(3), which authorizes access to address information for some but not for others. It is true that, as the Court noted in *Reporters Committee*, a right to privacy in information diminishes as the information becomes public, 489 U.S. at 763 and n 15. But because the California statute insulates crime victims and arrestees not from exposure but from intrusion, widespread publication of their identities still leaves them with an interest in avoiding invasion of their privacy by commercial concerns. The statute vindicates that interest.

The Court has distinguished carefully between an invasion of privacy by virtue of "a physical or other tangible intrusion into a private area" and an invasion by virtue of "the publication of information, whether true or not, the dissemination of which is embarrassing or otherwise painful to an individual." *Cox*

Broadcasting Corp. v. Cohn, 420 U.S. 469, 489 (1975); *see generally* W. Page Keeton *et al.*, *Prosser & Keeton on the Law of Torts*, 849-866 (5th ed. 1984) (recognizing four distinct kinds of invasion of privacy, including public disclosure of private facts and intrusion upon physical solitude or seclusion). Exposure and intrusion are entirely distinct species of invasion of privacy, and there is no suggestion that the former encompasses or eclipses the latter. Even if, as the court below thought, access to victims' and arrestees' address information is constitutionally indistinguishable from publication of that information, such exposure differs in kind from the intrusion that will follow the commercial access forbidden by the California statute.

The Court explicitly recognized this difference in *Florida Bar v. Went For It, Inc.*, where it reviewed a regulation limiting targeted direct-mail solicitation by attorneys. The Court criticized *Shapero's* "treatment of privacy" as "casual" and "perfunctory." 518 U.S. at 629-30. It recognized that there are "different kind[s] of intrusion": one that occurs when a lawyer "learn[s] about an accident or disaster," and another upon "the lawyer's confrontation of victims or relatives with such information." *Id.* at 630. The fact that attorneys had learned the identities of accident victims did not prevent the regulation from directly advancing the victims' interest in avoiding the separate invasion of privacy resulting from receipt of solicitations. *Id.* at 629-632. In other words, exposure of embarrassing or painful information does not leave an individual defenseless when that information is used to intrude upon his or her privacy in a different way.

Nor does the privacy interest in precluding discovery of personal information dissipate as soon as the information is known to anyone. It is by no means self-evident that identification as a crime victim or arrestee in the press is a greater invasion of privacy than widespread exposure as such to commercial interests. *Cf. Amelkin*, 1999 WL 73993 at *11 (Siler, J., concurring in part and dissenting in part) (identification as

accident victim in news media "intrudes much less than publication in a commercial pamphlet intended to aid attorneys and chiropractors in soliciting the victims"). But in any event, an individual whose privacy is invaded retains a privacy interest in restricting further dissemination of personal information. This is demonstrated most starkly by the Court's action in *Florida Star*. There, as noted above, the Court refused to penalize a newspaper for publishing the name of a rape victim. The victim's name was known to both the newspaper and its readers. Yet the Court, "[r]especting" the victim's privacy interests, referred to her only by her initials. 491 U.S. at 527 n 2. It would not have done so had the initial exposure rendered further attempts at concealment pointless.

The Court's FOIA cases likewise make clear that some loss of privacy does not vitiate all efforts to restrict further access to the disclosed information. The issue is discussed at length in *Reporters Committee*, in which the events summarized in the "rap sheet" being sought in the case had previously been disclosed piecemeal to the public. The requester of the information argued that because of the prior disclosures, the subject of the rap sheet's "privacy interest in avoiding disclosure of the federal compilation of these events approaches zero." 489 U.S. at 762-63. The Court rejected this "cramped notion of personal privacy." *Id.* at 763. "In an organized society," the Court remarked, "there are few facts that are not at one time or another divulged to another." *Id.* "'Meaningful discussion of privacy, therefore, requires the recognition that ordinarily we deal not with an interest in total nondisclosure but with an interest in selective disclosure.'" *Id.* at 763 n 14 (quoting Karst, *"The Files": Legal Controls over the Accuracy and Accessibility of Stored Personal Data*, 31 Law & Contemp. Prob. 342, 343-44 (1966)). The Court quoted the dictionary definition of "private" as "'intended for or restricted to the use of a particular person or group or class of person: not freely available to the public.'" *Reporters Committee* at 763-64 (cit. om.). Relying on "this attribute of a privacy interest," the

Court recognized "the distinction, in terms of personal privacy, between scattered disclosure of the bits of information contained in a rap sheet and revelation of the rap sheet as a whole." *Id.* at 764. Thus, the Court concluded, "the fact that 'an event is not wholly "private" does not mean that an individual has no interest in limiting disclosure or dissemination of the information.'" *Id.* at 770 (quoting Rehnquist, *Is An Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?*, Nelson Timothy Stephens Lectures, University of Kansas Law School, pt. 1, p. 13 (Sept. 26-27, 1974)); *see also Department of Defense*, 510 U.S. at 500-501 (recognizing that interest in privacy "does not dissolve" upon initial public access to information).

In any event, even if access to victims' and arrestees' addresses could become so general as to destroy their asserted privacy interest in all its dimensions, that is not what has happened so far, as this litigation itself demonstrates. In *Reporters Committee*, the Court recognized the difference between information "freely available" in piecemeal, "hard-to-obtain" form and the same information found in a centralized summary. 489 U.S. at 764. A party seeking disclosure of government information is in no position to suggest that its access to information is not an invasion of privacy simply because the information may be available from a different source or in a different form. "[I]f the summaries were 'freely available,'" the Court remarked in *Reporters Committee*, "there would be no reason to invoke the FOIA to obtain access to the information they contain." *Id.* And the same is true with respect to address information for victims and arrestees. This information is accessible to and may be published by those with journalistic, scholarly, political, governmental, and investigative purposes, and may thereafter be used by anyone for any purpose. But the presence of United Reporting in this lawsuit suggests that the resulting access is insufficient for commercial purposes. Systematic inspection of victims' and arrestees' addresses *en*

masse, of the sort that makes commercial solicitation practicable, simply does not occur in the absence of undertakings like United Reporting's. *See Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1514 (10th Cir.), *cert. denied*, 513 U.S. 1044 (1994) (upholding Colorado prohibition on access to criminal justice records for commercial purposes against First Amendment challenge and noting "that plaintiffs would not be involved in this litigation if the information they seek is so widely available that the privacy ... is no longer at issue"). The fact that the limited access authorized by the California statute produces substantially less disclosure of address information than would result from making the information accessible to everyone means that the privacy interest vindicated by the statute is neither illusory nor trivial.

A comparison between the present case and *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), on which the Ninth Circuit principally relied, is instructive in this regard. *Coors* involved a federal statute prohibiting beer labels from displaying the products' alcohol content. The government argued that the labeling ban was necessary to suppress the threat of "strength wars" among brewers, who would otherwise compete in the marketplace on the basis of the potency of their beers. This interest, while deemed substantial by the Court, was not directly advanced by the labeling ban "because of the overall irrationality of the Government's regulatory scheme." *Id.* at 488. There were, the Court reasoned, too many "exemptions and inconsistencies" in the scheme: It applied different policies to labels and to advertisements; it applied "only in States that affirmatively prohibit such advertisements"; it did not apply to wines and spirits; it permitted brewers to signal high alcohol content through use of the term "malt liquor." *Id.* at 488-489. In short, "the irrationality of this unique and puzzling regulatory framework ensures that the labeling ban will fail to achieve" its asserted purpose of "combating strength wars." *Id.* at 489.

A beverage's alcohol content is a bare fact that either is or is not disclosed. Because disclosure of this information has only one possible use -- as a purchasing criterion for consumers -- all disclosures of it are equivalent, and one form of disclosure renders pointless efforts to suppress disclosure in other forms. In the present case, by contrast, because privacy is subject to incremental infringements of different types and magnitudes, crime victims' and arrestees' interest in privacy is directly advanced even by a government regulation that permits access to and publication of their addresses in some circumstances. As this Court recognized in *Florida Bar*, tnere are "different kind[s] of intrusion" into privacy. 515 U.S. at 630. One invasion of privacy occurs, obviously, when arrest records are made accessible at all. Another, of a different sort, occurs when an arrestee's status as such is disclosed in the press. And a third invasion of privacy, *of a different order entirely*, occurs when arrestees have their addresses disclosed to commercial concerns and become susceptible to the barrage of solicitation that follows.

These multiple aspects of privacy are also what distinguish the present case from *Florida Star*. The statute at issue in that case suffered from, *inter alia*, "facial underinclusiveness" by punishing only publication of a rape victim's name in "instrument[s] of mass communication" and ignoring "[a]n individual who maliciously spreads word of the identity of a rape victim." 491 U.S. at 540. The State's failure to take "more careful and inclusive precautions against alternative forms of dissemination" meant that Florida's "selective ban on publication by the mass media" failed to accomplish its stated purpose of protecting privacy. *Id.* at 541. As in *Coors*, disclosure of a single piece of information (the identity of a rape victim) was at stake and a single type of privacy interest (exposure of embarrassing or painful information) was involved. The State's failure to prohibit all means of disclosure of this one fact undermined the asserted purpose of the statute. The privacy interest of the victim lay entirely in her

identity and thus was exhausted once her identity was disclosed.

The California law, by contrast, targets a particular type of disclosure -- use of address information in bulk for solicitation of arrestees -- and is tailored to achieve precisely that purpose. If those whom the statute authorizes to use the address information routinely published lists of addresses of arrestees, then *Coors* and *Florida Star* might apply. But they do not, and victims and arrestees retain a significant privacy interest in their addresses even when their identities are publicly disclosed. Thus, § 6254(f)(3) directly advances the State's interest in protecting the privacy of victims and arrestees from the onslaught of commercial solicitation that would result from permitting access to and publication of address lists.

The statute is likewise no more extensive than necessary to serve the State's interest in preserving the privacy of arrestees. This last prong of *Central Hudson* requires only a "reasonable fit" between a government's "legitimate interests" and "the means chosen to serve those interests." *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993). This is, the Court has said, "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served' [cit. om.]; that employs not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective." *Board of Trustees of SUNY*, 492 U.S. at 480.

The California statute is closely tailored to the public interest it serves. Commercial solicitation is, as this Court has made clear, a distinct species of invasion of privacy. The individual interest in avoiding this particular type of invasion of privacy differs from the interest in avoiding the identification as an arrestee that occurs when one's name is published by the media. Just as United Reporting's appetite for address lists of arrestees is not sated by scholarly or journalistic publication of information

about arrestees, so the arrestees' interest in avoiding commercial solicitation survives these uses. The statute targets commercial use of arrestees' addresses, and only such use, while in no way inhibiting the media's right to publish truthful information.

The present case thus does not resemble *Discovery Network*, in which the Court invalidated a ban, assertedly for aesthetic purposes, on freestanding newsracks containing commercial handbills. The ban did not affect the far more numerous newsracks devoted to distribution of newspapers. The central flaw in the ban was that its "distinction between commercial and noncommercial speech" bore "no relationship *whatsoever* to the particular interests" asserted by Cincinnati. 507 U.S. at 425. Rather, the city seems to have banned only commercial newsracks because that is all it thought it *could* ban: the supposedly lower value of commercial speech rendered it more susceptible to regulation than newspapers. *Id.* at 427-28. The fact that "the distinction Cincinnati has drawn has absolutely no bearing on the interests it has asserted" meant that the city had failed to "establis[h] the 'fit' between its goals and its chosen means" required by the fourth prong of *Central Hudson*. *Id.* at 428.

The California statute, by contrast, targets commerical speech not because such speech is more susceptible to government regulation but because it is the source of the distinct invasion of privacy against which the State is trying to protect. The distinction between commercial and scholarly, journalistic, governmental or investigative use of address information is, in the Court's phrase, "relevant to an interest asserted by" the State, *id.* at 428. That interest lies in protecting arrestees from the separate invasion of their privacy that occurs when address lists are used for commercial solicitation. A statute which precludes such use, while leaving untouched other uses of the information that do not result in a barrage of solicitation, is precisely tailored to achieve its legitimate purpose.

As noted in the preceding section, § 6254(f)(3) is more accurately regarded as a restriction on access to government records than as a limitation on speech, and thus properly viewed from the perspective of cases involving freedom of information statutes rather than in terms of the First Amendment. But even if address lists, as used by United Reporting, are commercial speech requiring review of California's statute under the *Central Hudson* standard, the limitations on their use embodied in the statute are narrowly tailored to serve directly and materially the State's interest in preserving arrestees' privacy from commercial solicitation. The statute accordingly satisfies the First Amendment.

CONCLUSION

FOR THE FOREGOING REASONS, THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT SHOULD BE REVERSED.

Respectfully submitted,

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